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## College Football Players Can't Tackle Athletic Conference's Tough Sanctions: Hairston v. Pacific 10 Conference

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COLLEGE FOOTBALL PLAYERS CAN'T TACKLE  
ATHLETIC CONFERENCE'S TOUGH SANCTIONS:  
*HAIRSTON v. PACIFIC 10 CONFERENCE*

I. INTRODUCTION

The regulation of intercollegiate athletics began with the formation of the National Collegiate Athletic Association (NCAA) in 1906.<sup>1</sup> In order to promote its purposes,<sup>2</sup> the NCAA has developed an extensive set of rules and regulations to govern intercollegiate athletics.<sup>3</sup> These rules are enforced through a disciplinary system which gives the NCAA and the NCAA member conferences<sup>4</sup> the power to levy appropriate sanctions on a violating institution's ath-

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1. See *NCAA v. Board of Regents*, 468 U.S. 85, 88-89 (1984) (describing NCAA's role in regulating college athletics). Colleges participating in intercollegiate athletics originally formed the NCAA in 1906 to promulgate rules of play for football in response to an increasing number of game-related injuries and deaths. See Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295 (1996). From there, the NCAA slowly began to govern all areas of intercollegiate athletics on a national level. See *id.* Today, the NCAA is a complex governing body, composed of numerous councils and committees, made up of approximately 1000 member institutions and 110 member conferences. See *id.* at 299 (footnotes omitted).

2. See NCAA Const. art. 1.2, *reprinted in* 1994-95 NCAA Manual 1 (1994). The NCAA includes as its "purposes":

(a) To initiate, stimulate and improve inter-collegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit; (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association; (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism. . . ; (h) To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; and (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics programs on a high level.

*Id.* The NCAA Constitution states that, "[a] basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athletes as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." See NCAA Const. art. 1.3.1, *reprinted in* 1994-95 NCAA Manual 1 (1994).

3. See generally NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1994-95 NCAA MANUAL (1994) (providing volume of over 500 pages containing NCAA Constitution, Operating Bylaws, Administrative Bylaws and Administrative Organization).

4. For a discussion of the NCAA's definition of "member conference," see *infra* notes 19-20 and accompanying text.

letic program.<sup>5</sup> Occasionally, the NCAA has faced legal challenges to the validity of its regulations and sanctions.<sup>6</sup> Not until recently, however, in *Hairston v. Pacific 10 Conference*,<sup>7</sup> has a member conference faced a similar claim against its sanctioning of one of its own member institutions. In *Hairston*, the Ninth Circuit affirmed the district court's dismissal of a federal antitrust claim and a third-party beneficiary breach of contract claim brought by five collegiate football players against their NCAA member conference.<sup>8</sup>

Cases involving intercollegiate athletics are important in the development of areas of the law such as antitrust and contracts because of the unique relationship the NCAA and its member conferences have with the member institutions and student-athletes.<sup>9</sup> A challenge to sanctions imposed by a member conference presents particularly interesting problems because courts have not faced this issue before,<sup>10</sup> and there exists an inherent conflict of interest when a conference is able to sanction one of its member institutions.<sup>11</sup>

This Note first details the facts that gave rise to the players' claims against the member conference.<sup>12</sup> Second, this Note surveys pertinent federal antitrust and state contract law, with specific reference to litigation involving the NCAA and intercollegiate athletics.<sup>13</sup> Third, this Note describes how the court arrived at its decision to affirm the dismissal of the players' antitrust and breach

5. See generally NCAA Bylaw art. 32, reprinted in 1994-95 NCAA Manual 455 (1994) (setting forth NCAA's "Enforcement Policies and Procedures"). For a discussion of member conferences' shared power with the NCAA to regulate and sanction its member institutions, see *infra* notes 19-20, 28, 31-32 and accompanying text.

6. See generally Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631 (1996) (discussing antitrust litigation involving NCAA); Heller, *supra* note 1, at 315-17 (discussing potential antitrust and breach of contract arguments against NCAA).

7. 101 F.3d 1315 (9th Cir. 1996).

8. See *id.* at 1318-20.

9. See *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (providing that horizontal restraints of trade imposed by NCAA were not per se antitrust violations, but instead warranted special treatment under antitrust rule of reason analysis). For a complete discussion of the *NCAA v. Board of Regents* decision, see *infra* notes 64-68 and accompanying text.

10. For a discussion of the novelty of the challenge to member conference-imposed sanctions, see *supra* notes 7-8 and accompanying text.

11. For a discussion of the inherent conflict of interest when a member conference sanctions a member institution, see *infra* notes 28-29, 31-32, 140 and accompanying text.

12. For a discussion of the facts in *Hairston*, see *infra* notes 17-35 and accompanying text.

13. For a discussion of pertinent legal background of *Hairston*, see *infra* notes 36-77 and accompanying text.

of contract claims.<sup>14</sup> Fourth, this Note analyzes the Ninth Circuit's reasoning and examines the propriety of the court's treatment of the pertinent legal tests in light of the evidence presented by the players.<sup>15</sup> Finally, this Note discusses the impact of *Hairston* on the ability of the NCAA and its member conferences to regulate and sanction their member institutions, as well as the effect of the court's decision on players who believe that the NCAA or their member conference has unfairly sanctioned their institution's athletic program.<sup>16</sup>

## II. FACTS

The University of Washington (UW)<sup>17</sup> is one of the ten institutions that comprise the Pacific 10 Conference (Pac-10),<sup>18</sup> which is a "member conference" of the NCAA.<sup>19</sup> Under the NCAA's system of enforcement, the NCAA and the Pac-10, as a member conference, concurrently wield the power to regulate and sanction Pac-10 member institution's NCAA rules violations.<sup>20</sup>

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14. For a discussion of the Ninth Circuit's analysis in *Hairston*, see *infra* notes 78-112 and accompanying text.

15. For an analysis of the Ninth Circuit's decision in *Hairston*, see *infra* notes 113-32 and accompanying text.

16. For a discussion of the impact of the Ninth Circuit's decision in *Hairston*, see *infra* notes 133-50 and accompanying text.

17. See *In Perspective* (visited Sept. 19, 1997) <<http://www.washington.edu/home/profile/perspective.html>>. UW is a public research university located in Seattle and attended by approximately 35,000 students. See *id.* UW has a prominent athletic department, with 23 intercollegiate athletic programs spanning both men's and women's sports. See *University of Washington - Digital Dawghouse* (visited Sept. 19, 1997) <<http://www.washington.edu/huskysports/>>. UW's mascot is the Husky, and accordingly, UW is sometimes referred to as "the Huskies." See *id.*

18. See *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1317 n.1 (9th Cir. 1996). The ten universities that comprise the Pac-10 are: (1) UW; (2) Washington State University; (3) the University of Oregon; (4) Oregon State University; (5) the University of California, Berkeley; (6) Stanford University; (7) the University of California, Los Angeles; (8) the University of Southern California; (9) Arizona State University; and (10) the University of Arizona. See *id.*

The Pac-10 is a voluntary private regional association of ten universities from the western United States whose purpose is "to establish an athletic program, administer intercollegiate athletic events, and stage conference tournaments." See *Hairston v. Pacific 10 Conference*, 893 F. Supp. 1485, 1489 (W.D. Wash. 1994) (*Hairston I*).

19. See NCAA Bylaws art. 3.02.3.3, reprinted in 1994-95 NCAA Manual 8 (1994). The NCAA defines a "member conference" as, "a group of college and/or universities that conducts competition among its members and determines a conference champion in one or more sports, duly elected to conference membership under the provisions of this article." *Id.* (parentheticals omitted).

20. See *Hairston I*, 893 F. Supp. at 1489. Under the NCAA's enforcement system, "[b]oth the Pac-10 and the NCAA promulgate and enforce rules governing the conduct of their members' athletic programs." *Id.* at 1489. The UW Mission Statement provides, "the [c]onduct of [UW's athletic department's] staff, coaches

Prior to the fall of 1992, the UW athletic program had a "clean" reputation based on its well-established history of compliance with NCAA regulations.<sup>21</sup> On November 5, 1992, the *Seattle Times* called into question UW's "clean" reputation in a report disclosing that UW's star quarterback, Billy Joe Hobert, had received a large, unsecured loan from an Idaho businessman.<sup>22</sup> While student-athletes are not completely forbidden from accepting loans under all circumstances, the NCAA greatly restricts the terms and conditions under which student-athletes can receive these types of "benefits."<sup>23</sup> Following the *Seattle Times*' report, UW and the Pac-10

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and student athletes shall remain within the spirit and intent of all applicable rules (NCAA, Pacific-10 and University of Washington), with special emphasis on honesty and upholding a high sense of character." *Mission Statement* (visited Sept. 19, 1997) <<http://www.washington.edu/huskysports/athletics/misionstate.html>>.

For a discussion of the NCAA's "purposes," including its legislative function, see *supra* note 2. According to the NCAA Constitution, a "member conference" is "a legislative body on the conference level." NCAA Const. art. 3.3.2.2.1, *reprinted in* 1994-95 NCAA Manual 13 (1994). The NCAA Constitution defines "legislative body" as "an athletics conference that develops and maintains rules and regulations governing the athletics programs and activity of its member institutions." NCAA Const. art. 3.02.2, *reprinted in* 1994-95 NCAA Manual 7 (1994). The member conferences will often handle local or regional problems, while the NCAA focuses mainly on the interregional and inter-conference issues in intercollegiate athletics. See *NCAA Online: About the NCAA* (visited Sept. 19, 1997) <<http://www.ncaa.org/about/>>.

21. See Danny Robbins & Elliott Almond, *Washington: A Program Gone Awry? Athletics: Interviews, Court and State Records Show That Some Football Players Received Cash, Jobs for Little or No Work, Use of Truck, Free Lodging*, L.A. TIMES, Dec. 9, 1992, at C1. Prior to 1992, UW had not been sanctioned for major NCAA rules violations since 1955. See *id.*

22. See Tom Farrey & Eric Nalder, *Huskies' Hobert Got \$50,000 Loan: Money From Businessman Spent in Spree; May Violate NCAA Rules, Lead to Sanctions*, SEATTLE TIMES, Nov. 11, 1992, at A1. The *Seattle Times*' story stated that there were "unusual conditions" surrounding Hobert's receipt of the loan, including most notably, that it had "no specific payback schedule" and it "was made even though Hobert had no assets to guarantee its repayment." *Id.* Other questionable aspects of the loan included its sheer size (\$50,000) and Hobert's status as a leading professional football prospect. See *id.*

23. See generally NCAA Bylaws art. 16.12, *reprinted in* 1994-95 NCAA Manual 222 (1994) (providing rules pertaining to "Benefits, Gifts and Services" to student-athletes). The NCAA's general rule regarding benefits, gifts and services reads, "[r]eceipt of a benefit by student-athletes, their relatives or friends is not a violation of NCAA rules if it is demonstrated that the same benefit is generally available to the institution's students and their relatives or friends." NCAA Bylaws art. 16.12.1.1, *reprinted in* 1994-95 NCAA Manual 222 (1994) (parenthetical omitted). Under what is known as the "extra benefit" rule, "[t]he student-athlete shall not receive any extra benefit. The term 'extra benefit' refers to any special arrangement by an institutional employee or representative of the institution's athletics interests to provide the student-athlete or his or her relatives or friends with a benefit not expressly authorized by NCAA legislation." NCAA Bylaws art. 16.12.2.1, *reprinted in* 1994-95 NCAA Manual 223 (1994). The NCAA includes "[a] loan of money" in its non-exhaustive list of extra benefits prohibited by this rule. See NCAA Bylaws art. 16.12.2.3(a), *reprinted in* 1994-95 NCAA Manual 223 (1994).

conducted an investigation into the loan.<sup>24</sup> This investigation ultimately revealed that the loan violated NCAA regulations, which cost Hobert his collegiate eligibility.<sup>25</sup>

Although neither the NCAA nor the Pac-10 initially sanctioned UW for the Hobert loan, the incident triggered immediate and intense scrutiny of UW's athletic department, particularly its football program.<sup>26</sup> In December of 1992, a *Los Angeles Times*' probe into the UW athletic program resulted in the publication of numerous allegations of previously undetected NCAA rules violations by the UW football program.<sup>27</sup> Spawned by the *Los Angeles Times*' report, the Pac-10 launched its own investigation into UW's football program.<sup>28</sup> On June 25, 1993, this investigation culminated in the Pac-10's filing of a "Notice of Charges," citing a wide range of NCAA

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In 1994, the NCAA enacted a regulation specifically dealing with loans which reads,

[a] student-athlete may receive a loan on a deferred pay-back basis without jeopardizing his or her eligibility, provided: (a) [t]he loan arrangements are not contrary to the extra-benefit rule, and (b) [t]he student-athlete's athletics reputation, skill or pay-back potential as a future professional athlete is not considered by the lending agency in its decision to provide the loan.

NCAA Bylaws art. 16.12.1.2, *reprinted in* 1994-95 NCAA Manual 222 (1994).

24. See Tom Farrey, *UW Rules Hobert Ineligible: Pac-10 Will Decide Whether Games Must Be Forfeited*, SEATTLE TIMES, Nov. 10, 1992, at A1.

25. See *id.* Specifically, UW determined that Hobert's loan violated the NCAA's extra benefit rule governing deferred pay-back loans. See *id.*

26. See *College Watch: Illegal Motion*, L.A. TIMES, Dec. 17, 1992, at B6. Both the Pac-10 and the *Los Angeles Times* launched investigations of possible NCAA violations by the UW football program. See *id.*

27. See Robbins & Almond, *supra* note 21, at C1. The *Los Angeles Times* report alleged the following violations by the UW football program: (1) players receiving large sums of money from boosters; (2) boosters arranging summer jobs where players were paid for little or no work; (3) boosters providing players with use of vehicles; and (4) boosters and assistant coaches arranging for free lodging for a player. See *id.* This report was significant because formal investigations of member institutions' athletic programs are frequently launched in response to media reports of alleged NCAA rules violations. See Heller, *supra* note 1, at 301-02.

According to NCAA Bylaws, a member institution's responsibility for the conduct of its athletics program includes responsibility for the acts of its "boosters." See NCAA Bylaws art. 6.4.2, *reprinted in* 1994-95 NCAA Manual 47 (1994). Specifically, this responsibility attaches if "a member of the institution's executive or athletics administration has knowledge or should have knowledge that such an individual . . . has assisted or is assisting in providing benefits to enrolled student-athletes . . ." *Id.* at art. 6.4.2(d). Therefore, although not committed by an institution official, improper booster conduct can result in violations of NCAA rules and corresponding sanctions. See *id.*

28. See Robbins & Almond, *supra* note 21, at C1. Here, the Pac-10, as opposed to the NCAA, conducted the investigation because it has a reputation as a conference that controlled its member institutions. See *id.*

rules violations by the UW football program.<sup>29</sup> After filing the Notice of Charges, the Pac-10 Council, which is composed of representatives from the ten Pac-10 universities,<sup>30</sup> officially sanctioned UW for its NCAA rules violations.<sup>31</sup>

29. See Danny Robbins & Elliot Almond, *Huskies' Boosters Accused by Pac-10 Investigation: Dozens of Alleged Violations Are Listed in 38-Page Report, Including Summer No-Work Jobs for Athletes*, L.A. TIMES, June 26, 1993, at C1. According to the NCAA Bylaws, the NCAA or the member conference must provide the member institution under investigation a "Notice of Charges" for major violations. See NCAA Bylaws art. 19.5.1, reprinted in 1994-95 NCAA Manual 340 (1994). The notice must contain: "[a] notice of any specific charges against it and the facts upon which such charges are based . . . ." *Id.* Additionally, the notice grants the member institution "[a]n opportunity to appear before the Committee on Infractions [or the corresponding member conference body] to answer such charges by the production of evidence." *Id.* (parentheticals omitted).

The *Los Angeles Times* reported that, in its Notice of Charges, the Pac-10 charged UW with numerous violations of NCAA rules over an eight-year period. See Robbins & Almond, *supra*, at C1. In addition to the improper booster activities, the Notice of Charges contained allegations concerning the Hobert loan, an allegation of recruitment misconduct by the head football coach's son-in-law and a general charge that "[t]he school showed a lack of institutional control in the manner in which it accounted for expenses for football recruits' official campus visits . . . ." *Id.*

30. See Robbins & Almond, *supra* note 29, at C1 (explaining that Pac-10 Council is composed of athletic program officials and faculty representatives from the ten conference schools).

31. See Elliot Almond, *Washington Huskies Get Tough Pac 10 Penalties, Sports: Football Coach Resigns After Conference Imposes Sanctions for Violations of NCAA Rules*, L.A. TIMES, Aug. 23, 1993, at A1 [hereinafter Almond, *Washington Huskies Get Tough*]. The Pac-10 Council found the following six major NCAA rules violations: (1) UW student athletes were improperly employed during summers and holidays; (2) UW quarterback, Billy Joe Hobert's improper acceptance of the large, unsecured loan; (3) UW boosters provided UW football players with free meals and excessive wages; (4) UW boosters offered recruiting inducements illegally to prospective UW student athletes; (5) UW boosters illegally made recruiting contacts with prospective UW student athletes; and (6) UW hosts improperly used meal expenses on prospective student athletes on official recruiting visits. See *id.*

As a result of these findings, the Pac-10 Council levied the following sanctions on UW: (1) a two-year bowl ban; (2) a one-year television revenue ban; (3) a two-year limit on scholarships; (4) a two-year reduction of recruiting visits; and (5) a two-year probationary period. See *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1317 (9th Cir. 1996). The television ban was projected to cost UW \$1.4 million in lost revenue. See *id.*

The Pac-10's sanctioning process begins with a hearing held by the Pac-10 Compliance and Enforcement Committee. See Almond, *Washington Huskies Get Tough*, *supra*, at A1. This body then submits a recommendation to the Pac-10 Council for possible sanctions. See *id.* Next, the Pac-10 Council hands down the sanctions based on the Compliance and Enforcement Committee's recommendation. See *id.* The Pac-10's Chief Executive Officers then must ratify the Pac-10 Council's sanctions. See *id.* Finally, the NCAA reviews the conference-imposed sanctions and may increase, but cannot reduce the member conference's sanctions. See *id.* It has been shown that the NCAA rarely amends conference-imposed sanctions. See *id.*

In what was characterized as "a surprising move," The *Los Angeles Times* reported that the Pac-10 Council, which is comprised of officials from the Pac-10

The severity of the Pac-10 imposed sanctions triggered immediate outcries of unfairness and impropriety from the UW sports community.<sup>32</sup> Devastated by the impact of these sanctions, a disparate group of football supporters and football players from UW, though not representing UW, brought a lawsuit in federal district court against the Pac-10 seeking monetary damages and injunctive relief under a variety of legal theories.<sup>33</sup> In *Hairston v. Pacific 10 Conference*, the Ninth Circuit affirmed the district court's dismissal of the

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member institutions, considered too lenient the sanctions recommended by the Pac-10 Compliance and Enforcement Committee. See Elliot Almond, *A Storm Seattle Won't Forget: First the Sanctions Then Don James Quits, It Was a Tough Day in Washington*, L.A. TIMES, Aug. 26, 1993, at A1 [hereinafter Almond, *A Storm*]. Consequently, the Pac-10 Council enhanced the sanctions and targeted them more specifically toward the UW football program. See *id.* The *Los Angeles Times*' response to these sanctions was that "[t]he penalties [imposed on UW by the Pac-10 were] some of the stiffest ever given by the conference and serve as the final chapter in an eight-month ordeal in which allegations of NCAA rules violations surfaced from newspaper reports." See Almond, *Washington Huskies Get Tough*, *supra*, at A1 (emphasis added).

32. See Almond, *Washington Huskies Get Tough*, *supra* note 31, at A1; Steve Springer, *Crying Foul: Hobert Says the Pac-10 Treated Huskies Unfairly*, L.A. TIMES, Aug. 24, 1993, at C1. UW Athletic Director, Barbara Hedges stated, "[w]e believe the penalties are too harsh and unwarranted in this case . . . [the sanctions set a standard that is] almost unheard of in the NCAA." See Almond, *Washington Huskies Get Tough*, *supra* note 31, at A1. Athletic Director Hedges also expressed disbelief over the severity of the sanctions in relation to penalties imposed on other violating schools. See *id.*

In addition, in the wake of these sanctions, long-time head football coach Don James resigned, explaining, "I have decided I can no longer coach in a conference that treats its players and coaches so unfairly . . . [b]y looking at the penalties, it appears we are all guilty, based in large part upon statements of questionable witnesses." *Id.* A UW football player also added, "I think penalties we have to live by now are far too severe for the things that were wrong . . . [t]he wrongdoings were minor in a lot of people's eyes and don't compare to a lot of other institutions." *Id.*

Primary culprit, Billy Joe Hobert, was also outwardly critical of the severity of UW's sanctions and the process that the Pac-10 used to determine these sanctions: I read in the paper that the Pac-10 is the only league that institutes its own charges on cases like this . . . I think it was totally biased. I think the Pac-10 is sick and tired of the University of Washington kicking their hind end every time we play them in a game. They should have had some other unbiased institution come in, maybe somebody from the Big Ten or the Big Sky . . . I don't think the penalties levied fit the crime . . . The NCAA isn't that tough. That just blows me away. I can't believe it. Springer, *supra*.

33. See *Hairston I*, 893 F. Supp. 1485, 1488-89 (W.D. Wash. 1994). The original parties to this suit were five football players, a football season ticket holder and two UW souvenir sellers who had licensing agreements with UW. See *id.* The original suit brought by these parties included: (1) federal antitrust claims under the Sherman Act, 15 U.S.C. §§ 1, 4 and 16; (2) claims under the Washington Consumer Protection Act, RCW 19.86.020 and 19.86.030; (3) a third party beneficiary breach of contract claim; (4) a claim of tortious interference with a business expectancy; and (5) claims of violations of state constitutional due process guarantees. See *id.*



plaintiffs'<sup>34</sup> claims on the grounds that: (1) they failed to show anti-trust injury; and (2) they did not qualify as third-party beneficiaries of a contract between UW and the Pac-10.<sup>35</sup>

### III. BACKGROUND

In *Hairston v. Pacific 10 Conference*, the players appealed the district court's dismissal of their federal antitrust claim and their third-party beneficiary breach of contract claim.<sup>36</sup> This section first discusses the general principles of these legal theories, and then explores how they have been applied in the context of intercollegiate athletics.<sup>37</sup>

#### A. Antitrust Background

The federal government's regulation of trusts formally began in 1890, when Congress passed the Sherman Antitrust Act (Sherman Act) with the purpose of promoting a competitive economy by restricting anticompetitive business practices.<sup>38</sup> Twenty-four years

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34. See *Hairston*, 101 F.3d 1315 (9th Cir. 1996). On appeal, the plaintiffs were the five UW football players, as they were the only parties to appeal the district court's dismissal. See *id.*

35. See *id.* In *Hairston I*, the district court granted the Pac-10's 12(b)(6) motion to dismiss for all the plaintiffs' claims, with the exception of the football players' federal and state antitrust claims. See *Hairston I*, 893 F. Supp. at 1485. The district court later granted the Pac-10's motion for summary judgment for the remaining claims. See *Hairston v. Pacific 10 Conference*, 893 F. Supp. 1495 (W.D. Wash. 1994) (*Hairston II*). The *Hairston* case is the football players' appeal of the district court's grant of summary judgment against their antitrust claims in *Hairston II* and the district court's dismissal of their breach of contract claim for failure to state a claim upon which relief can be granted in *Hairston I*. See *Hairston*, 101 F.3d at 1317-18.

36. See *Hairston*, 101 F.3d 1315. For a discussion of the players' claims against the Pac-10, see *supra* note 35 and accompanying text.

37. For a discussion of the background of federal antitrust law, see *infra* notes 38-58 and accompanying text. For a discussion of the background of the third-party beneficiary breach of contract theory, see *infra* notes 59-60 and accompanying text. For a discussion of the application of these legal theories in the intercollegiate athletics context, see *infra* notes 61-77 and accompanying text.

38. See Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (15 U.S.C. § 1 (1988)). Section 1 of the Sherman Act reads in pertinent part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." *Id.*

In *Northern Pacific Railway v. United States*, Justice Black explained the purpose of the Sherman Act:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But

later, Congress passed the Clayton Act, which established a private cause of action for damages and injunctive relief for plaintiffs who are able to prove violations of the federal antitrust laws under the Sherman Act.<sup>39</sup>

In order to more uniformly decide antitrust claims brought under the Sherman and Clayton Acts, federal courts have developed a series of common law tests based on the interpreted legislative intent and the plain language of these Acts.<sup>40</sup> As a result, plaintiffs bringing antitrust suits must meet two threshold requirements: (1) they must show that the defendant caused them antitrust injury; and (2) they must demonstrate standing to bring the antitrust claim.<sup>41</sup>

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even were that premise open to question, the policy unequivocally laid down by the Act is competition.

356 U.S. 1, 4-5 (1958) (citing *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)).

39. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, ch. X(A) (4th ed. 1997). Section 15 of the Clayton Act provides a private right of action for monetary damages, as it reads in pertinent part, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor[e] . . . ." 15 U.S.C. § 15(a); see also 15 U.S.C. § 26 (providing private right of action for injunctive relief in antitrust actions).

40. For a discussion of the common law developments in the area of antitrust law, see *infra* notes 41-58 and accompanying text. In *National Society of Professional Engineers v. United States*, the Supreme Court explained its interpretation of the legislative intent of the Sherman Act:

Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

435 U.S. 679, 688 (1978) (citing 21 Cong.Rec. 2456 (1890) (noting comments of Sen. Sherman)).

41. See generally 2 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 360f, at 202-04 (rev. ed. 1995). Although a court must consider the issue of constitutional standing before a case may proceed, under prevailing antitrust doctrine, a court may dismiss a case on its merits without even reaching the standing issue. See *id.* at 202-03; see also *Levine v. Central Fla. Med. Affiliates*, 72 F.3d 1538, 1545 (11th Cir. 1996) (recognizing Areeda and Hovenkamp as authorities in stating "[w]hen a court concludes that no violation has occurred, it has no occasion to consider standing"); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848 (9th Cir. 1995) (determining there was antitrust injury and therefore not reaching antitrust standing issue). But see, *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 153 (9th Cir. 1989) (en banc) (holding "[e]stablishment of [antitrust] standing, logically precedes the presentation of a plaintiff's case.").

## 1. Antitrust Injury Requirement

In *Bhan v. NME Hospitals, Inc.*,<sup>42</sup> the Ninth Circuit announced that in order to establish that the defendant caused antitrust injury, plaintiffs must demonstrate: (1) the existence of a contract, combination, or conspiracy; (2) an unreasonable restraint of trade under either the per se or the rule of reason analysis; and (3) that the restraint affected interstate commerce.<sup>43</sup> Of the three, the second requirement has emerged as the most pivotal of the analysis.<sup>44</sup> This requirement, that the plaintiff prove the restraint in question was unreasonable, is not found in the language of the federal antitrust statutes.<sup>45</sup> Instead, courts have injected this reasonableness requirement into the antitrust analysis in order to separate necessary or beneficial restraints of trade from those that are unnecessary or detrimental to trade.<sup>46</sup>

When determining whether a restraint of trade is unreasonable, the court will undertake either a per se or a rule of reason analysis.<sup>47</sup> The per se analysis is used when a defendant's activities

42. 929 F.2d 1404 (9th Cir. 1991). This case involved a federal antitrust claim brought by a nurse anesthetist against a hospital that permitted only physicians to administer anesthesia services. See *id.* at 1408-09. The Ninth Circuit found no antitrust violation because the anesthetist failed to meet the threshold requirement of showing antitrust injury. See *id.* at 1413-14.

43. See *id.* at 1410 (citing T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 632-33 (9th Cir. 1987)).

44. See, e.g., *id.* at 1412-14. In *Bhan*, the plaintiff fulfilled the first and third antitrust injury requirements by showing sufficient evidence of a conspiracy, as well as offering evidence that the restraint affected interstate commerce. See *id.* at 1413. Therefore, the court dealt only with the second requirement: whether the practice of permitting only physicians to administer anesthesia services constituted an unreasonable restraint of trade. See *Bhan*, 929 F.2d at 1413. The court in *Bhan* analyzed the hospital's practice under the rule of reason and held that the plaintiff failed to meet his burden of showing that the hospital's practice resulted in an unreasonable restraint of trade. See *id.* at 1412-14.

45. See, e.g., *supra* notes 38-39 and accompanying text (providing text and discussion of relevant antitrust provisions).

46. See *Bhan*, 929 F.2d at 1409. The Ninth Circuit cited *Chicago Board of Trade v. United States*, as the classic formulation of the reasonableness analysis in federal antitrust law. See *id.* at 1409 n.3 (citing 246 U.S. 231 (1918)). Justice Brandeis' oft-cited rationalization for the adoption of the reasonableness standard for antitrust analysis provides:

[T]he legality of an agreement or regulation cannot be determined by . . . whether it restrains competition. Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

*Chicago Board of Trade*, 246 U.S. at 238.

47. See *Bhan*, 929 F.2d at 1410 (discussing Ninth Circuit's application of per se and rule of reason analyses in antitrust cases). For a discussion of the rule of reason and per se analyses, see *infra* notes 48-51 and accompanying text.

have regularly produced anticompetitive effects,<sup>48</sup> while the rule of reason analysis is used where the per se analysis does not apply.<sup>49</sup> The rule of reason analysis requires a balancing of the plaintiffs' evidence of the restraint's anticompetitive effects against the defendant's showing of the activity's procompetitive effects; the plaintiff must then show how the procompetitive effects can be accomplished in a less restrictive manner.<sup>50</sup> If plaintiffs are unable to meet their burden at any point of this analysis, the plaintiffs' antitrust claim will fail.<sup>51</sup>

## 2. Antitrust Standing Requirement

The antitrust standing requirement is based on Section 4 of the Clayton Act, which broadly defines the class of persons who can

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48. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958). In *Northern Pacific*, the Supreme Court noted that courts should apply the per se analysis where the "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 5. Here, the Supreme Court ruled that a vertical agreement between a railroad and a subsidiary was a per se violation of antitrust law. See *id.* at 2.

In *Bahn*, the Ninth Circuit explained that under the per se analysis, "we do not require evidence of any actual effects on competition because we consider the potential for harm to be so clear and so great." *Bhan*, 929 F.2d at 1410. The court further emphasized that plaintiffs naturally prefer the per se analysis because "it greatly simplifies the proof required." *Id.*

Examples of restraints of trade that courts have held to be per se antitrust violations include horizontal price fixing, division of markets, certain tying arrangements and some types of boycotts. See *id.* (citing *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988)). Additionally, in *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, the Ninth Circuit called into question the dichotomy between the rule of reason analysis and the per se rule, but noted that the per se analysis is "applicable where experience has established that anticompetitive consequences regularly follow from the condemned practice." 890 F.2d 139, 151 (9th Cir. 1989) (en banc) (citing *United States v. Topco Associates*, 405 U.S. 596, 607 (1972)).

49. See *Bhan*, 929 F.2d at 1410. The *Bhan* court explained that under the rule of reason analysis, the court must analyze "the degree of harm to competition along with any justifications or procompetitive effects to determine whether the practice is unreasonable on balance." *Bhan*, 929 F.2d at 1410; see also *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (explaining that rule of reason analysis "focuses directly on challenged restraints' impact on competitive conditions."); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988) (noting that in contrast to per se analysis, rule of reason analysis requires case-by-case study of particular circumstances of case). In *Bahn*, the Ninth Circuit held that the plaintiff failed to show that the hospital's policy substantially restrained competition in the relevant market. See *Bhan*, 929 F.2d at 1413.

50. See *Bhan*, 929 F.2d at 1413.

51. See *id.*

maintain a private antitrust claim.<sup>52</sup> On its face, Section 4 of the Clayton Act does not impose a standing requirement, as it places no express limitations on who can bring an antitrust claim.<sup>53</sup> The Supreme Court, however, has determined that Congress did not intend to create unlimited federal antitrust standing.<sup>54</sup> Instead, the Supreme Court has decided that Congress meant for the courts to interpret and narrow the broad language of the Clayton Act.<sup>55</sup>

As a result, the Supreme Court has developed requirements that antitrust plaintiffs must satisfy in order to demonstrate stand-

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52. See Clayton Act, 15 U.S.C. § 15. Section 15 provides, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor[e] . . . ." *Id.* For a detailed discussion of § 4 of the Clayton Act, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, ch. X (4th ed. 1997).

53. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 530 (1983). In *Associated General*, the Supreme Court explained, "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Id.* at 529.

54. See *id.* at 529-35. The Supreme Court noted that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534 (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972)).

In *Associated General*, the Supreme Court ruled against a labor union in its federal antitrust claim against a contractor's association that entered into a bargaining agreement which encouraged union workers to join non-union firms. See *id.* at 520-46. The basis of the court's decision was that the plaintiff labor union failed to prove it had antitrust standing. See *Associated General*, 459 U.S. at 544-46. In the course of its reasoning, the court thoroughly analyzed the purpose and legislative intent of § 4 of the Clayton Act. See *id.* at 529-35. In its decision, the Supreme Court provided its classic rationale for imposing an antitrust standing requirement:

An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

*Id.* at 534-35 (quoting *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S. 465 (1982) (citations omitted)); see also *Chicago Board of Trade*, 246 U.S. at 238 (concluding that antitrust laws cannot apply to every activity that restrains trade because restraint of trade is the essence of trade agreements); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc) (explaining that "[*Associated General*] made clear that § 4 of the Clayton Act is not be read literally so that 'any person' who was injured 'by reason of anything forbidden by the antitrust laws' could maintain an action." (citing *Associated General*, 459 U.S. at 535)).

55. See *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978). In *National Society*, the Supreme Court declared, "[t]he legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Id.*; see also *R.C. Dick*, 890 F.2d at 146 (applying Supreme Court's interpretation of § 4 of Clayton Act).

ing to bring an antitrust action under Section 4 of the Clayton Act.<sup>56</sup> Accordingly, in order to demonstrate antitrust standing, plaintiffs must show first, that they suffered antitrust injury,<sup>57</sup> and second, that they are the proper plaintiffs to bring the antitrust action.<sup>58</sup>

## B. Breach of Contract Background

Under general principles of contract law, plaintiffs who are not parties to a contract can successfully bring a claim for breach of contract against a party to that contract if the plaintiffs can show that they are third-party beneficiaries of the contract.<sup>59</sup> In the State of Washington, in order for plaintiffs to prove that they are third-

56. For a discussion of the common law test for antitrust standing under § 4 of the Clayton Act, see *infra* notes 57-58 and accompanying text.

57. See *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104 (1986). The first requirement imposes a burden on antitrust plaintiffs to show that their injury and the defendant's activities were within the prohibitions of the antitrust laws. See *id.* at 109. In *Cargill*, the Supreme Court explained that under the first requirement:

plaintiffs seeking treble damages under § 4 must show more than simply an 'injury causally linked' to a particular merger; instead, 'plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'

*Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

58. See *Cargill*, 479 U.S. at 110 n.5. The second prong of the standing analysis requires antitrust plaintiffs to show that they are the appropriate plaintiffs to maintain the antitrust claim against the defendant. See *id.* Federal courts have developed a variety of criteria to determine whether a plaintiff meets this requirement. See *Associated General*, 459 U.S. at 534-42 (1983). In *Associated General*, the Supreme Court provided two criteria for determining whether a plaintiff is a proper antitrust plaintiff. See *id.* The first criterion considered by the court was whether a private attorney general could more effectively combat the defendant's trust through its function under the Clayton Act. See *id.* at 542; see also *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 542 (9th Cir. 1987) (discussing Supreme Court's first criterion for determining whether plaintiff is appropriate antitrust plaintiff). Second, the Court considered the causal connection between the defendant's activities and the plaintiff's injuries. See *Associated General*, 459 U.S. at 534 (citation omitted).

In addition, some circuits have adopted their own criteria for determining whether a plaintiff is a proper antitrust plaintiff. See, e.g., *R.C. Dick*, 890 F.2d at 146 (citing *Associated General*, 459 U.S. at 537-45) (noting that Ninth Circuit considers the following criteria relevant: (1) the specific intent of the defendants; (2) the directness of the injury; (3) the nature of the damages, including the risk of duplicative recovery; (4) the existence of other, more appropriate plaintiffs; and (5) the nature of the plaintiff's claimed injury).

59. See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). The Restatement states:

Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to

party beneficiaries, they must show that in light of the circumstances surrounding the contract, the parties to the contract objectively intended for the contract to directly benefit the plaintiffs.<sup>60</sup>

### C. Intercollegiate Athletics and the Law

Recently, disputes within intercollegiate athletics have become ripe subjects for litigation.<sup>61</sup> Parties challenging NCAA regulations and rulings have frequently based their claims on federal antitrust law and on principles of contract law.<sup>62</sup> This section discusses the

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performance in the beneficiary is appropriate to effectuate the intention of the parties and either

- (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
- (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

*Id.* For common law origins and development of third party beneficiary theory of contract law, see generally *Lawrence v. Fox*, 20 N.Y. 268 (1859) (recognizing for first time right of third party to sue on contract); *Seaver v. Ransom*, 224 N.Y. 233 (1918) (recognizing right of third-party beneficiary where there is pecuniary obligation running from promisee to beneficiary); *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928) (discussing limits of third-party beneficiary claims in context of public service contracts).

60. See *Postlewait Constr., Inc. v. Great American Ins. Cos.*, 720 P.2d 805, 806 (Wash. 1986) (citing *Lonsdale v. Chesterfield*, 662 P.2d 385 (Wash. 1983)). *Postlewait* involved an action brought by a lessor of cranes directly against a lessee's insurance company seeking payment for damages to their cranes caused by the insured lessee. See *id.* at 805-06. The Supreme Court of Washington affirmed a motion for summary judgement by the insurance company on the grounds that the lessor failed to establish that it was a third-party beneficiary of the insurance policy between the lessee and the insurance company. See *id.* at 806-07. The Supreme Court of Washington explained the test for third-party beneficiaries as follows:

[B]oth contracting parties must intend that a third party beneficiary contract be created. Furthermore, the test of intent is an objective one; the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather, 'whether performance under the contract would necessarily and directly benefit' that party. The contracting parties' intent is determined by construing the terms of the contract as a whole, in light of the circumstances under which it is made.

*Id.* at 806-09 (citing *Lonsdale v. Chesterfield*, 662 P.2d 385 (Wash. 1983); *Grand Lodge of Scandinavian Fraternity of Am., Dist. 7 v. United States Fidelity & Guar. Co.*, 98 P.2d 971 (Wash. 1940)).

61. See generally, *Heller*, *supra* note 1, at 312-18 (discussing recent lawsuits challenging NCAA regulations and enforcement process).

62. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (challenging NCAA television plan under Sherman Act). Other plaintiffs have brought constitutional-based claims against the NCAA. See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (dismissing college basketball coach's Civil Rights Act challenge to NCAA sanctions because NCAA was not state actor); *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993) (holding Nevada state law which imposes due process requirements on NCAA violates Commerce Clause of Constitution). For further discussion of con-

application of these legal theories in recent lawsuits involving intercollegiate athletics.<sup>63</sup>

### 1. Federal Antitrust Arguments

In *NCAA v. Board of Regents of the University of Oklahoma*,<sup>64</sup> several member institutions sued the NCAA alleging that a television plan proposed by the NCAA violated federal antitrust laws.<sup>65</sup> In this leading federal antitrust law decision, the Supreme Court used the rule of reason analysis to strike down the NCAA's television plan, even though the plan constituted a horizontal restraint of trade which normally triggers the per se antitrust analysis.<sup>66</sup> The NCAA

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stitutional-based challenges to NCAA regulations and rulings, see generally Heller, *supra* note 1, at 312-14; Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487 (1995); Latour Rey Lafferty, *The NCAA's Unbridled Enforcement Power, and the Validity of Florida's Collegiate Athletic Association Compliance Enforcement Procedures Act*, 68 FLA. B.J. 104 (1994); Wendell Cruz, *Due Process: A Nevada State Statute Attempting To Regulate the Investigations by the NCAA Regarding Association Infractions is Unconstitutional*, 5 SETON HALL J. SPORT L. 675 (1993); Kenneth E. James, *Collegiate Sports and NCAA Enforcement Procedures: Does the NCAA Play Fairly?* NCAA v. Miller, 29 CAL. W. L. REV. 429 (1993); Sherry Young, *Is "Due Process" Unconstitutional? The NCAA Wins Round One in its Fight Against Regulation of its Enforcement Proceedings*, 25 ARIZ. ST. L.J. 841 (1993); Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99 (1992).

63. For a discussion of the application of federal antitrust and contract law in claims involving intercollegiate athletics, see *infra* notes 64-77 and accompanying text.

64. 468 U.S. 85 (1984).

65. See *id.* The NCAA's television plan limited the total number of televised games, restricted the number of games each member institution could have televised and prohibited member institutions from individually selling television rights to its games. See *id.* at 91-94. According to the NCAA, the purpose of the plan was "to reduce the adverse effect of live television upon football game attendance." *Id.* at 92 n.6.

66. See *id.* at 86-88, 99-104. For a discussion of the per se rule, see *supra* notes 49-51 and accompanying text. The *Board of Regents* Court began by explaining that the NCAA television plan was horizontal restraint on trade, which the court defined as "an agreement among competitors on the way in which they will compete with one another." *Board of Regents*, 468 U.S. at 99. The Court then discussed how horizontal restraints of trade normally warrant the per se antitrust analysis, stating "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high . . ." *Id.* at 100. Here, however, the Court used the rule of reason analysis to determine whether the plan was an antitrust violation. See *id.* at 100-01. The Court held definitively that even under the rule of reason analysis, the NCAA's television plan violated Section 1 of the Sherman Act, stating:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sher-



clearly “lost the battle” because the Court invalidated its television plan;<sup>67</sup> the NCAA appears to have “won the war,” however, as this case established a precedent of applying the more lenient rule of reason analysis in determining whether NCAA-imposed restraints of trade violate federal antitrust law.<sup>68</sup>

As a result of the *Board of Regents* decision, antitrust claims against the NCAA have been overwhelmingly unsuccessful.<sup>69</sup> For

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man Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court’s conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.

*Board of Regents*, 468 U.S. at 120. For a discussion of the impact of the *Board of Regents* decision on antitrust regulation of intercollegiate athletics, see D. Kent Meyers & Ira Horowitz, *Private Enforcement of the Antitrust Laws Works Occasionally: Board of Regents of the University of Oklahoma v. NCAA, A Case in Point*, 48 OKLA. L. REV. 669 (1995).

67. See *Board of Regents*, 468 U.S. at 120.

68. See *id.* at 101-03. The court’s rationale for using the rule of reason analysis was that, “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.” *Id.* at 117. In an oft-quoted statement, the court expounded on this rationale by providing a complete explanation of why horizontal restraints are essential in the regulation of intercollegiate athletics, and therefore, scrutinized under the less restrictive rule of reason analysis. See *id.* at 101-02. The court wrote:

[w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed . . . [m]oreover, the NCAA seeks to market a particular brand of football—college football. The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like. And the integrity of the ‘product’ cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

*Id.* The court then went on to adopt the rule of reason analysis in this case because it reasoned that in the industry of intercollegiate athletics, “horizontal restraints on competition are essential if the product is to be available at all.” *Id.* at 101.

69. See generally Heller, *supra* note 1, at 315-16 (discussing courts’ use of rule of reason analysis to dismiss parties’ antitrust claims against NCAA); Roberts, *supra* note 6, at 2631 (criticizing courts’ application of antitrust law to dismiss antitrust

example, courts have recently invoked the rule of reason analysis in upholding NCAA eligibility standards against antitrust attacks by student-athletes.<sup>70</sup> Moreover, courts have also consistently rejected antitrust challenges to NCAA-imposed sanctions, as a result of the use of the more permissive rule of reason analysis.<sup>71</sup>

## 2. Contract Law Arguments

In addition to antitrust claims, plaintiffs have occasionally challenged the validity of NCAA regulations and rulings under contract law theories.<sup>72</sup> For instance, in *Trustees of the State Colleges and Universities v. NCAA*,<sup>73</sup> the Court of Appeals of California enjoined the NCAA from enforcing sanctions against a member institution that allegedly permitted ineligible players to participate in various athletic events.<sup>74</sup> The court granted the injunction because it held that the member institution demonstrated the applicability of the

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claims against NCAA and calling for legislative intervention to standardize application of antitrust law in intercollegiate athletics).

70. See, e.g., *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) (dismissing student-athlete's challenge to NCAA eligibility rules by concluding rules were not subject to antitrust analysis); *Banks v. NCAA*, 746 F. Supp. 850 (N.D. Ind. 1990) (dismissing student-athlete's challenge to NCAA eligibility rules by holding rules did not violate federal antitrust law). For further analysis of cases involving antitrust challenges to NCAA eligibility rules, see Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports are Forcing Change*, 4 SETON HALL J. SPORT L. 483 (1994); Paul B. McCarthy & Michael Kettle, *An End Run Around the Sherman Act? Banks v. NCAA and Gaines v. NCAA*, 19 J.C. & U.L. 295 (1993).

71. See, e.g., *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (applying rule of reason analysis in dismissing Southern Methodist University student-athletes' antitrust suit against NCAA); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) (applying rule of reason analysis in dismissing University of Arizona student-athletes' antitrust challenge to NCAA-imposed sanctions).

In contrast, professional athletes have successfully invoked antitrust law in challenging actions by their sport's governing body. See, e.g., *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973) (holding suspension of professional golfer by LPGA's Executive Board composed of plaintiff's competitors violated federal antitrust law).

72. See generally Heller, *supra* note 1, at 316-18 (discussing challenges to NCAA sanctions under contract theories).

73. 147 Cal. Rptr. 187 (Cal. Dist. Ct. App. 1978).

74. See *id.* The member institution, California State University Hayward (CSUH), was confused by the NCAA's "1.6 Rule" which forbade first year student-athletes (freshmen) from participating in athletic events if their grade point average (GPA) was below 1.6. See *id.* at 189-90. CSUH was unsure whether this rule applied to all athletic events, or just to post-season events. See *id.* As a result, CSUH requested and received an interpretation of the rule from the NCAA, which affirmed CSUH's reading that it only applied to post-season athletic events. See *id.* at 190. The NCAA subsequently released an "Official Interpretation" which provided that the 1.6 Rule applied to all athletic events. See *id.* at 190. CSUH, unaware of the NCAA's rendering of its Official Interpretation, relied on the prior interpretation it received from the NCAA and permitted student athletes with

doctrine of equitable estoppel, which permits the court to enforce otherwise unenforceable contracts.<sup>75</sup>

Although use of this doctrine proved successful in *Trustees of State Colleges*, plaintiffs have infrequently had the opportunity to invoke the equitable estoppel doctrine because the NCAA is ordinarily very cautious and thorough in issuing interpretations of its regulations.<sup>76</sup> Future plaintiffs, however, may continue to attempt creative uses of contract law to attack the validity of NCAA regulations and rulings.<sup>77</sup>

#### IV. NARRATIVE ANALYSIS

In *Hairston v. Pacific 10 Conference*, the Ninth Circuit reviewed the district court's dismissal of the players' federal antitrust and breach of contract claims against the Pac-10.<sup>78</sup> The court first considered the district court's grant of summary judgment against the players for their federal antitrust claim.<sup>79</sup> Second, the court addressed the district court's dismissal of the players' breach of contract claim for failure to state a claim upon which relief could be granted.<sup>80</sup> In addition, the concurring opinion added a supplemental analysis of the players' standing to bring their federal antitrust claim.<sup>81</sup>

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GPA's under 1.6 to play in non-post-season games. *See id.* at 190-91. The NCAA then sanctioned CSUH for violating the 1.6 Rule. *See id.* at 191.

75. *See id.* at 193. The court explained that in order to invoke the doctrine of equitable estoppel, the party seeking estoppel must show: (1) the opposing party was aware of the relevant facts; (2) the opposing party's actions were either intended to induce him to act, or he had a right to believe the opposing party had this intention; (3) the party seeking estoppel was ignorant of the true facts; and (4) he detrimentally relied on this action. *See id.* at 193. The court addressed each of these elements and concluded that the doctrine applied because when it permitted the ineligible players to play, CSUH reasonably relied on the NCAA's interpretation of the eligibility rules. *See id.* at 195. Therefore, the NCAA was estopped from enforcing its subsequent Official Interpretation of the 1.6 Rule against CSUH. *See id.*

76. *See Heller, supra* note 1, at 317 (noting that "[t]he NCAA has apparently been more careful in the administration and application of its rules in recent years, as this avenue of relief is seldom utilized for NCAA sanctions.").

77. *See, e.g., id.* at 317 (citing MILWAUKEE J. SENTINEL, Nov. 11, 1995, at 2C; *For the Record*, USA TODAY, Nov. 9, 1995, at 11C) (discussing recent New Mexico case where NCAA was enjoined from declaring University of New Mexico basketball player ineligible because NCAA failed to provide adequate interpretation of freshman eligibility rules).

78. *See Hairston*, 101 F.3d 1315, 1315-20 (9th Cir. 1996).

79. *See id.* at 1318-20.

80. *See id.* at 1320.

81. *See id.* at 1320-23.

## A. Players' Federal Antitrust Claim

The Ninth Circuit began by addressing the players' appeal of the district court's grant of summary judgment against them on their federal antitrust claim.<sup>82</sup> Specifically, the players asserted that the Pac-10 violated federal antitrust law by imposing sanctions on UW that were "grossly disproportionate to the University's violations."<sup>83</sup> The players characterized the imposition of these "disproportionate" sanctions as a conspiracy by UW's Pac-10 competitors to cripple the extremely successful UW football program, thereby reducing competition within the Pac-10 and improving the other teams' chances of success.<sup>84</sup>

The Pac-10 submitted that the appellate court should uphold summary judgment on this issue because the players lacked the requisite antitrust standing.<sup>85</sup> Although the district court dismissed the players' antitrust claim on this basis,<sup>86</sup> the Ninth Circuit found this reasoning unpersuasive, but affirmed the district court's dismissal on alternative grounds.<sup>87</sup>

The Ninth Circuit affirmed the district court's grant of summary judgment against the players' antitrust claim because it found that they failed to demonstrate that the Pac-10 caused them antitrust injury.<sup>88</sup> In reaching this decision, the majority relied on the

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82. See *id.* at 1317-19. The players originally sought both monetary damages, under § 4 of the Clayton Act, and injunctive relief, under § 16 of the Clayton Act, for the Pac-10's alleged antitrust violation. See *Hairston*, 101 F.3d at 1317. The court, however, only heard the players' claim for damages (under § 4 of the Clayton Act) because it determined injunctive relief would serve no purpose at the time this appeal was heard because UW's penalty period had already expired. See *id.* at 1317 n.2. The players appealed seeking monetary damages from the Pac-10-imposed sanctions in the form of the travelling and room and board expenses lost by virtue of the bowl ban. See *id.* at 1317.

83. *Id.*

84. See *id.* at 1317.

85. See *Hairston*, 101 F.3d at 1317-18. Since the players' federal antitrust claim for injunctive relief was not at issue, the Pac-10's argument that the players lacked antitrust standing was based exclusively on Section 4 of the Clayton Act. See *id.*

86. See *id.* at 1318 (citing *Hairston II*, 893 F. Supp. 1495, 1496 (W.D. Wash. 1995)). In *Hairston II*, the district court granted summary judgment for the Pac-10 because of the players' failure to "come forward with specific facts in support of their conspiracy allegations once a legitimate reason for defendants' conduct has been suggested . . . [T]his case [is] dismissed for failure to present evidence of an anticompetitive conspiracy as required to establish a Sherman Act § 1 violation." *Hairston II*, 893 F. Supp. at 1496.

87. See *Hairston*, 101 F.3d at 1318. The court explained, "[a]lthough we are not persuaded by the reasoning in the district court's opinion [in *Hairston II*], we need not decide whether appellants have met the requirements for antitrust standing, because they have failed to establish any violation of the antitrust laws." *Id.* (citation omitted).

88. See *id.* at 1318.

theory that the court need not address the standing issue in a federal antitrust claim when the plaintiffs fail to demonstrate antitrust injury.<sup>89</sup> The court affirmed the dismissal of the players' antitrust claim, therefore, not because the players lacked antitrust standing, but rather based on the merits of the claim.<sup>90</sup>

The *Hairston* majority began its analysis of the merits of the players' antitrust claim by applying the test set forth by the Ninth Circuit in *Bhan v. NME Hospitals, Inc.*,<sup>91</sup> to determine whether a plaintiff has established a valid antitrust claim under Section 1 of the Sherman Act.<sup>92</sup> The *Hairston* court focused on the second prong of the *Bhan* three-prong test which requires an antitrust plaintiff to prove that the defendant engaged in a restraint of trade that was unreasonable.<sup>93</sup>

In its analysis of the reasonableness of the Pac-10's restraint of trade, the court relied on *NCAA v. Board of Regents of the University of Oklahoma*,<sup>94</sup> which formed the basis of its use of the rule of reason analysis instead of the traditional per se analysis.<sup>95</sup> The court determined that the players met their initial burden under the rule of reason analysis by showing that the Pac-10's restraint of trade pro-

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89. See *Hairston*, 101 F.3d at 1318. The court relied on the following language from Areeda and Hovenkamp, "[w]hen a court concludes that no violation has occurred, it has no occasion to consider [antitrust] standing . . ." *Id.* (quoting 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 360f, at 202-03 (rev. ed. 1995)) (footnotes omitted). For other circuits' adoption of this language from Areeda and Hovenkamp, see, for example, *Levine v. Central Florida Med. Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir. 1996); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 855 n.10 (9th Cir. 1995); *McCormack v. Nat'l Collegiate Athletic Assoc.*, 845 F.2d 1338, 1343 (5th Cir. 1988).

90. See *Hairston*, 101 F.3d at 1318.

91. 929 F.2d 1404 (9th Cir. 1991).

92. See *Hairston* at 1318-19 (quoting *Bhan*, 929 F.2d at 1410); for a discussion of the relevant antitrust prongs from *Bhan*, see *supra* notes 42-49 and accompanying text.

93. See *Hairston*, 101 F.3d at 1319. The court determined that the first and third prongs from *Bhan* were "not at issue." *Id.* According to the court, the players met their burden under prong one because "[t]he Pac-10 members' agreement to sanction UW fulfills the 'contract, combination, or conspiracy' prong." *Id.* The court based this determination on *NCAA v. Board of Regents of the University of Oklahoma* where the Supreme Court held that certain horizontal restraints of trade are necessary in college sports to maintain competitive balance. See *Hairston*, 101 F.3d at 1319 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 99-102 (1984)). The court also held that the third prong was not at issue because "[t]he parties do not dispute that the agreement affects interstate commerce." *Id.* For a discussion of other cases that have held prongs one and three are not at issue, see, for example, *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991).

94. 468 U.S. 85 (1984).

95. See *Hairston*, 101 F.3d at 1319 (quoting *Board of Regents*, 468 U.S. at 99). The court based its decision to use the rule of reason analysis exclusively on the reasoning from *Board of Regents*, without providing any other rationale. See *id.*

duced a significant anticompetitive effect.<sup>96</sup> The court then held that the Pac-10 satisfied its burden, as a defendant, under the rule of reason analysis, by successfully demonstrating the procompetitive effects of its restraint of trade.<sup>97</sup> The players' federal antitrust claim ultimately failed because they could not satisfy their final burden under the rule of reason analysis of showing how the Pac-10 could achieve the procompetitive effects of its restraint through less restrictive means.<sup>98</sup>

### B. Players' Breach of Contract Claim

The players also appealed the district court's dismissal of their breach of contract claim against the Pac-10.<sup>99</sup> The players argued

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96. See *id.* at 1319 (citing *Bhan*, 929 F.2d at 1413). The court determined that the players' evidence of the sanctions imposed by the Pac-10, specifically the two-year bowl ban, was enough to meet their initial burden of showing that the Pac-10's restraint on trade produced a significant anticompetitive consequence. See *id.* at 1319.

97. See *id.* (citing *Bhan*, 929 F.2d at 1413). The court ruled that the Pac-10's evidence of the "significant procompetitive effects of punishing football programs that violate the Pac-10's amateurism rules" satisfied their burden as defendants under the rule of reason. *Hairston*, 101 F.3d at 1319. The court cited to *Board of Regents* as support for the proposition that the regulation of college athletics has procompetitive effects. See *id.* (citing *Board of Regents*, 468 U.S. at 101-02). In *Board of Regents*, the Supreme Court reasoned that the success of college athletics is due in large part to amateurism and the requirement that the athletes attend classes. See *Board of Regents*, 468 U.S. at 101-02. Therefore, by creating "mutual agreements" with its member institutions, the NCAA (and therefore the Pac-10) "plays a vital role" in "preserving the character and quality" of college sports. *Id.*

98. See *Hairston*, 101 F.3d at 1319. The court pointed out that the players did not have a significant burden at this point because to overcome a summary judgment motion in the Ninth Circuit, the non-moving party need only provide more than "a mere scintilla of evidence to support [their] case." *Id.* (citing *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992)). The Ninth Circuit affirmed the Pac-10's motion for summary judgment because the players failed to meet their burden under the rule of reason analysis. See *id.*

The court determined that the plaintiffs did "not offer even the thinnest reed of support" for their claim that the Pac-10-imposed sanctions were "grossly disproportionate" to UW's violations. *Id.* at 1319. In fact, the court explained that evidence the players introduced to support their argument actually *contradicted* their argument that the Pac-10's sanctions were "grossly disproportionate" to the department's violations. See *id.* First, the players relied on testimony from a UW law professor familiar with UW's athletic department's case. See *id.* The professor testified, however, that after analyzing and comparing the sanctions imposed by the Pac-10, they were "within range of appropriate penalties." *Id.* Second, the players introduced an NCAA report in an attempt to show that the NCAA concluded that the sanctions were too harsh. See *Hairston*, 101 F.3d at 1319. The court revealed, however, that the NCAA report actually suggested "that the Pac-10's penalties were too lenient, not that they were too harsh." *Id.*

99. See *Hairston*, 101 F.3d at 1319-20. In *Hairston I*, the district court dismissed the players' breach of contract claim on the grounds that, [t]he only evidence before the court consists of vague, hortatory pronouncements in the contract between the Pac-10 and its member schools.

that language contained in the Pac-10 Constitution, Bylaws and Articles ("Pac-10 Materials") was evidence of the formation of a contract between the Pac-10 and UW, with the players as third-party beneficiaries.<sup>100</sup> The players submitted that the Pac-10 breached this contract by imposing disproportionate sanctions on UW which caused injury to the players as third-party beneficiaries.<sup>101</sup>

The Ninth Circuit upheld the district court's dismissal of the players' breach of contract claim on the grounds that the players failed to establish that they were third-party beneficiaries of the contract.<sup>102</sup> The State of Washington's contract law provides that a person who is not a party to a contract cannot bring a claim as a third-party beneficiary, unless, based on the circumstances under which the contract was made, there is evidence of an objective intent by the parties to the contract to undertake a direct obligation to the non-contracting party.<sup>103</sup> The court concluded that the players failed to qualify as third-party beneficiaries because, in the opinion of the court, the language the players cited from the Pac-10 Materials was not created with the intent of making them third-party beneficiaries.<sup>104</sup>

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By themselves, these pronouncements are not sufficient to support the players' claims that the Pac-10 intended to assume a direct contractual obligation to every football player on a Pac-10 team.

*Hairston I*, 893 F. Supp. at 1494.

100. See *Hairston*, 101 F.3d at 1319-20. The players relied on language in the Pac-10 Materials which stated that "the purpose of the Pac-10 is to provide its student athletes with 'quality competitive opportunities' and to conduct its affairs so as to enrich the athletic and academic experience of its student athletes." *Hairston I*, 893 F. Supp. at 1494. Specifically, the players alluded to the Pac-10 Constitution's "Statement of Purpose," which states that the goal of the Pac-10 is "to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, [and] to enhance athletic and academic integrity among its members." *Hairston*, 101 F.3d at 1320.

101. See *Hairston*, 101 F.3d at 1320.

102. See *id.* The court provided that "[t]he key here is that [the players] have not demonstrated that the parties intended to create direct legal obligations between themselves and the students." *Id.*

103. See *Hairston*, 101 F.3d at 1320. The court explained, "[t]he test of intent is an objective one; the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather whether performance under the contract would necessarily and directly benefit that party." *Id.* at 1320 (quotation omitted).

104. See *id.* The court held, "[o]ther than the statements from the Pac-10's Constitution, By-laws and other legislation, appellants [the players] have failed to provide any evidence that the parties intended to create a contractual obligation; accordingly, we find their claim without merit." *Id.* In reaching this conclusion, the court referred to the district court's characterization of the players' evidence as "vague, hortatory pronouncements in the contract" and "not sufficient to support players' claims that the Pac-10 intended to assume a direct contractual obligation

### C. Concurring Opinion

In the concurring opinion, Judge Trott expressed support for the majority's holding;<sup>105</sup> however, Judge Trott also took the opportunity to reexamine the issue of antitrust standing that was raised at the district court level, but left unresolved by the majority opinion of the circuit court.<sup>106</sup> The concurring opinion was intended to rectify the district court's erroneous determination that the players had the requisite standing to bring their antitrust claim.<sup>107</sup>

The concurring opinion began by citing Ninth Circuit precedent which held that standing is the threshold issue plaintiffs must establish before a court can reach the merits of the claim.<sup>108</sup> The concurring opinion next discussed the Supreme Court cases that established the antitrust standing requirement under Section 4 of the Clayton Act.<sup>109</sup> Judge Trott then applied the test for antitrust

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to every football player on a Pac-10 team." *Id.* (quoting *Hairston I*, 893 F. Supp. at 1494).

105. See *Hairston*, 101 F.3d at 1320 (Trott, J., concurring). Judge Trott explained, "I concur wholeheartedly in . . . [the majority's] excellent analysis of the merits of the appellants' failed attempt to mount an antitrust case against the NCAA and the Pac-10." *Id.*

106. See *id.* Judge Trott noted, "I write separately, however, to point out that there is yet another significant reason to affirm the district court's dismissal of this case: *Hairston* and his colleagues manifestly lack antitrust standing to bring this lawsuit, and thus cannot even qualify as valid plaintiffs." *Id.* The concurring opinion was triggered by "the majority's unexplained statement that they 'are not persuaded by the reasoning in the district court's opinion' regarding the antitrust standing issue." *Id.* at 1321.

107. See *Hairston*, 101 F.3d at 1321 (Trott, J., concurring). Trott's concurring opinion stated,

By not deciding this threshold issue, I'm concerned that we might encourage other potential litigants to limber up their bats to take unwarranted swings at targets legally beyond their reach. My concern is aroused because we leave intact and on the books the district court's holding that these plaintiffs do have antitrust standing, a holding which I respectfully believe is demonstrably erroneous.

*Id.* at 1320-21 (citing *Hairston I*, 893 F. Supp. 1485 (W.D. Wash. 1994)). According to Judge Trott, the intent of the concurring opinion was to "advise . . . potential [antitrust] litigants [like the players in the instant case] that they do not have standing to come into court with these kinds of alleged injuries." *Id.*

108. See *id.* The concurring opinion relied on another Ninth Circuit case, *R.C. Dick*, in noting that "[e]stablishment of [antitrust] standing, logically, precedes the presentation of a plaintiff's case." *Id.* (quoting *R.C. Dick Geothermal v. Thermogenics, Inc.*, 890 F.2d 139, 152 (9th Cir. 1989) (en banc)). According to Judge Trott, "[t]he plaintiff's ability to fulfill the requirements of antitrust standing is an essential threshold element of an antitrust case whereas constitutional standing is essential to the jurisdiction of the court." *Hairston*, 101 F.3d at 1321 (Trott, J., concurring) (citing *R.C. Dick*, 890 F.2d at 145). The concurring opinion pointed out that *R.C. Dick* analogized antitrust standing to reaching first base before scoring a run in baseball. See *id.* at 1321 (Trott, J., concurring).

109. See *id.* On this issue, Judge Trott explained that "Congress, in enacting section 4 of the Clayton Act, 'did not intend the antitrust laws to provide a remedy



standing, determining that the players failed to meet the requirement of proving that they were appropriate antitrust plaintiffs.<sup>110</sup> The concurring opinion analyzed the players' claim under the factors used to determine whether a plaintiff is an appropriate antitrust plaintiff.<sup>111</sup> After considering and balancing these factors, Judge Trott concluded that the players "failed utterly" in proving they were appropriate antitrust plaintiffs and therefore, had no standing to bring their antitrust claim.<sup>112</sup>

## V. CRITICAL ANALYSIS

In light of the circumstances and legal precedent surrounding the *Hairston* case, the Ninth Circuit's decision to affirm the district court's dismissal of the players' federal antitrust claim was appropriate.<sup>113</sup> The court had ample authority for dismissing this claim on

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in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Id.* (citing *Associated Gen. Contractors of Cal., Inc. v. California St. Council*, 459 U.S. 519, 534 (1983)). The concurring opinion continued, "[t]hus, 'in such case . . . the alleged injury [of a plaintiff] must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall.'" *Id.* at 1321 (Trott, J., concurring) (citing *Associated Gen. Contractors of Cal., Inc. v. California St. Council*, 459 U.S. 519, 539 (1983)).

110. *See Hairston*, 101 F.3d at 1321. Judge Trott's concurring opinion listed the following requirements for antitrust standing under § 4 of the Clayton Act: "(1) . . . the plaintiff must show that he or she has suffered 'antitrust injury;' and (2) . . . the plaintiff must also show that he or she is an appropriate antitrust plaintiff." *Id.* (citations omitted).

111. *See id.* at 1321-22. The concurring opinion provided that the two general factors are: (1) "how connected the players' injuries are to the alleged antitrust violation;" and (2) "whether the players appropriately fulfill the private attorneys' general function of the Clayton Act." *Id.* at 1321 (citations omitted). In addition, the concurring opinion explained that it would consider a variety of other factors including: "(1) the character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and whether the damages' character makes them too speculative; (2) the specific intent of the alleged conspiracy; (3) the directness of the injury; and (4) the existence of other, more appropriate plaintiffs." *Id.* at 1321-22 (citing *R.C. Dick*, 890 F.2d at 146).

112. *Hairston*, 101 F.3d at 1322 (Judge Trott, J., concurring). Trott reasoned, "[that] the practical consequences of allowing the players to bring this lawsuit after the university-which has suffered enormous economic losses-has agreed to sanctions, demonstrates that the players are not the proper antitrust plaintiffs . . ." *Id.* Rather, Judge Trott determined that UW was a far more appropriate party to bring this antitrust suit. *See id.* at 1322-23.

Judge Trott's concurring opinion submitted that a finding that the players had standing "would invite numerous groups of indirectly injured parties to bring antitrust lawsuits . . ." *Id.* Judge Trott therefore announced, ". . . because the players lack antitrust standing, I would reverse the district court's published order of May 20, 1994 [*Hairston*] which held to the contrary. In all other respects, I concur in [the majority's] opinion." *Id.* at 1323.

113. For a discussion of the court's treatment of players' federal antitrust claim, see *supra* notes 82-98 and accompanying text.

its merits, rather than on the players' lack of antitrust standing.<sup>114</sup> More importantly, the court correctly relied on *NCAA v. Board of Regents of the University of Oklahoma*,<sup>115</sup> as the authority for its application of the rule of reason analysis in this case, even though there was a horizontal restraint of trade which normally triggers the per se antitrust analysis.<sup>116</sup> The court properly applied the rule of reason analysis in dismissing the players' antitrust claim when it held that the players failed to show how the Pac-10 could accomplish the procompetitive effects of sanctioning the UW football program in a less restrictive manner.<sup>117</sup> The players' federal antitrust claim, therefore, was doomed ultimately by their inability to prove that the Pac-10 imposed sanctions were disproportionate to UW's violations.<sup>118</sup>

The *Hairston* ruling raises the issue of whether courts leave the NCAA and its member conferences too much power to regulate and sanction the behavior of their member institutions by providing special treatment under federal antitrust law.<sup>119</sup> In *Board of Regents*, the Court found that the NCAA's television plan violated antitrust law.<sup>120</sup> At the same time, the Court advocated using the more lenient rule of reason analysis to decide antitrust claims involving the NCAA, even though the NCAA frequently creates horizontal restraints of trade.<sup>121</sup> Under the traditional per se analysis, a plaintiff's burden is greatly diminished, and in *Hairston*, the players

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114. See *Hairston*, 101 F.3d at 1322-23.

115. 468 U.S. 85 (1984).

116. For a discussion of the Supreme Court's application of rule of reason analysis in antitrust claims involving NCAA regulations and rulings, see *supra* notes 64-71 and accompanying text.

117. For a discussion of the court's application of the rule of reason analysis, see *supra* notes 94-98 and accompanying text.

118. For a discussion of the court's treatment of the inadequacy of the players' evidence, see *supra* note 98 and accompanying text. For independent authorities' discussion of players' failure to provide evidence of the disproportionate violations, see generally *9th Circuit Finds Pac-10's Sanctions Not a Basis For Antitrust Injury*; *Hairston v. Pacific-10 Conference*, 22 ANDREWS SPORTS & ENT. LITIG. REP. (1997); *Court Rejects Ex-Huskies' Antitrust Suit: Players Failed to Show Pac-10 Sanctions Were Excessive*, *Court Rules*, SEATTLE TIMES, Dec. 4, 1996, at C3.

119. For a discussion of Pac-10 regulation and enforcement procedures, see *supra* notes 29-31 and accompanying text. Constitutional-based arguments also raise this issue, as plaintiffs have argued NCAA regulations and rulings violate procedural due process guarantees. See *supra* note 70. (discussing cases bringing constitutional-based challenges to NCAA rules and regulations).

120. See *Hairston*, 101 F.3d at 1319. For a complete discussion of the Supreme Court's holding in *Board of Regents*, see *supra* notes 64-68 and accompanying text.

121. For a discussion of the traditional use of the per se analysis for horizontal restraints of trade, see *supra* note 48 and accompanying text.

may have been able to satisfy the requirement of showing antitrust injury under the per se analysis.<sup>122</sup>

Even if the players were able to meet their burden of showing antitrust injury, their claim would still likely fail as the court would ultimately reach the issue of the players' antitrust standing, which according to the sound reasoning of the concurring opinion, the players could not prove.<sup>123</sup> However, because the concurring opinion is not binding precedent,<sup>124</sup> the majority opinion leaves open the possibility of a successful claim by similarly situated plaintiffs, if they could show that the member conference-imposed sanctions were disproportionate to the institution's violations.<sup>125</sup> This is because the majority failed to address the standing issue, as raised by the district court and the concurring opinion, and simply found other grounds to dismiss the case.<sup>126</sup>

By citing authority for the proposition that a court must decide the antitrust standing issue before deciding the case on its merits, the concurring opinion may have undercut the majority opinion to

122. Compare *supra* note 48 and accompanying text with *supra* notes 49-50 and accompanying text (illustrating diminished burden on plaintiff with per se analysis as compared to rule of reason analysis). The *Hairston* court, however, could not abandon the rule of reason analysis unless the plaintiff was able to distinguish *Board of Regents*, which requires the application of the rule of reason analysis when assessing restraints of trade within intercollegiate sports. See *Hairston*, 101 F.3d at 1319 (citing *Board of Regents*, 468 U.S. at 101-03); see also *McCormack v. NCAA*, 845 F.2d 1338, 1343-45 (5th Cir. 1988) (citing *Board of Regents* as authority for using rule of reason analysis in deciding federal antitrust challenges to NCAA rulings).

123. For a discussion of Judge Trott's concurring opinion that the players lacked antitrust standing, see *supra* notes 105-12 and accompanying text.

124. See, e.g., *County of Allegheny v. ACLU-Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (declining to treat previous concurring opinion as precedent because it was not opinion of majority). The Court held, "[i]t has never been my understanding that a concurring opinion 'suggest[ing] a clarification of our . . . doctrine,' could take precedence over an opinion joined in its entirety by [a majority] of the Court." *Id.* (citations and footnotes omitted).

125. See generally, *Associated Press, Court Rejects Ex-Huskies' Antitrust Suit: Players Failed to Show Pac-10 Sanctions Were Excessive, Court Rules*, SEATTLE TIMES, Dec. 4, 1996, at C3. The *Seattle Times* article explained, "[t]he court declined to decide whether a player could ever challenge a conference penalty against an athletic program on antitrust grounds, saying there was no need to resolve that issue in this case." *Id.* This article notes that the concurring opinion directly addressed this issue by declaring that these players, and those similarly situated could not bring a federal antitrust claim against their conference because they lack antitrust standing. See *id.*

126. See *Hairston*, 101 F.3d at 1318. The *Hairston* court paid lip-service to the district court's finding that the players have antitrust standing, "[a]lthough we are not persuaded by the reasoning in the district court's opinion, we need not decide whether appellants have met the requirements for antitrust standing, because they have failed to establish any violation of the antitrust laws." *Id.* (citation omitted).

an extent.<sup>127</sup> The issue of whether antitrust standing is a threshold requirement appears unresolved in the Ninth Circuit, as cases cited by the majority and the concurring opinion seem to clash on whether the plaintiff must establish antitrust standing before the court can reach the merits.<sup>128</sup> While this is a relevant issue to this case, it probably would not have changed the outcome as it is likely that the court would have dismissed the players' antitrust claim for lack of antitrust standing whenever it reached that question.<sup>129</sup>

The court's treatment of the players' breach of contract claim, though given short shrift, is also internally consistent.<sup>130</sup> The court was correct in ruling that the players' claim under the third-party beneficiary theory failed because they could not prove they were intended beneficiaries of the "contract" between UW and the Pac-10.<sup>131</sup> The court properly concluded that the language cited by the players from the Pac-10 Materials did not create obligations to the players as intended beneficiaries, and therefore, there was no contract from which they could base a breach of contract claim.<sup>132</sup>

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127. See *Hairston*, 101 F.3d at 1320-23 (Trott, J., concurring). For a discussion of the concurring opinion's authority for treating antitrust standing as the only threshold element, see *supra* note 108. Specifically, the concurring opinion cites to the Ninth Circuit's decision in *R.C. Dick* which held that "[e]stablishment of [antitrust] standing, logically precedes the presentation of a plaintiff's case" and analogized antitrust standing to getting to first base before scoring a run. *Id.* at 1322 (citing *R.C. Dick Geothermal v. Thermogenics, Inc.*, 890 F.2d 139, 152 (9th Cir. 1989) (en banc)).

128. Compare *supra* note 89 and accompanying text, with *supra* note 108 and accompanying text (demonstrating how Ninth Circuit appears to adopt conflicting rules on whether antitrust standing is only threshold element or whether court can decide antitrust case on its merits before reaching antitrust standing issue).

129. See *supra* note 41 and accompanying text (explaining that even if court determined plaintiffs met burden of showing antitrust injury, court would still have to decide issue of plaintiffs' antitrust standing).

130. For a discussion of the court's dismissal of the players' breach of contract claim for their failure to establish that they were third-party beneficiaries of the contract between the Pac-10 and UW (as embodied in the Pac-10 Materials), see *supra* notes 99-104 and accompanying text.

131. For a discussion of the State of Washington's third-party beneficiary test, see *supra* notes 59-60. Like the State of Washington, most states have adopted the Restatement of Contracts Section 302 as the rule for the third party beneficiary theory. See, e.g., *Grigerik v. Sharpe*, 699 A.2d 189 (Conn. App. 1997) (adopting Restatement of Contracts Section 302 in Connecticut); *Moore Const. Co., Inc. v. Clarksville Dep't of Electricity*, 707 S.W.2d 1 (Tenn. App. 1985) (adopting Restatement of Contracts Section 302 in Tennessee); *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983) (adopting Restatement of Contracts Section 302 in Pennsylvania).

132. For a discussion of the court's dismissal of players' third-party beneficiary breach of contract claim, see *supra* notes 99-104.

## VI. IMPACT

The Ninth Circuit's primary holding in *Hairston* is a logical extension of the Supreme Court's decision in *Board of Regents*, which provided the NCAA wide latitude to create horizontal restraints of trade over its member institutions.<sup>133</sup> As a result, when faced with antitrust challenges to member conference-imposed sanctions, courts in the Ninth Circuit and other jurisdictions that adopt *Hairston* will rely on the Supreme Court's *Board of Regents* decision and likewise apply the rule of reason analysis, which protects restraints of trade as long as they are reasonable.<sup>134</sup>

This line of decisions will likely have minimal impact on other areas of antitrust law, as the uniqueness of intercollegiate athletics severely limits the applicability of these cases outside this context.<sup>135</sup> This case is instructional to the antitrust lawyer, however, because it is an example of a court's willingness to tailor antitrust law to accommodate necessary restraints of trade within a specialized industry.<sup>136</sup>

The *Hairston* court's analysis of the players' federal antitrust claim highlights the inadequacy of the players' arguments,<sup>137</sup> and at the same time teaches valuable lessons for future similarly situated plaintiffs.<sup>138</sup> For example, it appears that the players' arguments might have been more persuasive had they offered evidence of

133. For a discussion of the *Board of Regents* decision, see *supra* notes 64-68. This latitude is derived from the court's application of the rule of reason analysis to an NCAA member-conference's horizontal restraint of trade. See *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

The breach of contract claim was a basic application of third-party beneficiary theory and adds nothing new outside its specific application to this case. For a discussion of the court's third-party beneficiary analysis used in *Hairston*, see *supra* notes 99-104.

134. For a discussion of the *Board of Regents* decision, see *supra* notes 64-68 and accompanying text. For discussion of the impact of the *Board of Regents* decision, see generally, Meyers & Horowitz, *supra* note 66; Heller, *supra* note 1.

135. See *Board of Regents*, 468 U.S. at 101-02 (discussing unique and special context of NCAA and intercollegiate athletics).

136. See *id.*

137. For a complete discussion of the contradictory nature of the evidence offered by the players in their antitrust claim, see *supra* note 98 and accompanying text. For example, the evidence offered by the players to support their federal antitrust claim included testimony by a law professor who indicated that the Pac-10 penalties were within an appropriate range and an NCAA report that stated that the Pac-10 sanctions on UW were too lenient. See *Hairston*, 101 F.3d at 1319.

For a complete discussion of the contradictory nature of the evidence offered by the players in their breach of contract claim, see *supra* notes 99-104 and accompanying text.

138. See generally *Hairston*, 101 F.3d at 1319 (analyzing failures of players' federal antitrust claim).

other institutions that committed more serious violations of NCAA regulations, but received less severe sanctions.<sup>139</sup> In addition, to enhance their conspiracy argument, the players could have more strongly emphasized the inherent conflict of interest within the Pac-10 Council, which is composed of officials from UW's rival schools, yet is vested with the authority to impose crippling sanctions with little review by a neutral, detached party.<sup>140</sup>

While the court's legal analysis of the players' case in *Hairston* was sound, the decision seems unjust because it leaves the UW football players who appeared to be unduly punished, without remedy or recourse.<sup>141</sup> The sanctions the Pac-10 imposed on UW were for violations committed in the 1980's and early 1990's;<sup>142</sup> however, it was the players succeeding the violators in UW's football program,

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139. See, e.g., Broyles, *supra* note 62, at 487, 499-503 (discussing NCAA violations committed by Auburn University and resulting NCAA-imposed sanctions). In 1993, Auburn University was sanctioned by the NCAA for committing numerous NCAA rules violations including: (1) cash payments to players by Auburn assistant football coaches, athletic department administrators and other representatives of Auburn's athletics; (2) playing ineligible players; (3) providing extra grant-in-aid to players; and (4) general failure to oversee football program. See Bruce Lowitt, *Auburn Penalized by NCAA*, ST. PETERSBURG TIMES, Aug. 19, 1993, at 1C. As compared UW, the NCAA imposed the following less severe sanctions on Auburn despite its more serious infractions: (1) a one-year ban on conference championship and post-season play; (2) a two-year probation; (3) a one-year television ban; and (4) a three-year reduction of available grants-in-aid (scholarships). See *id.* For further discussion of the impact of the Auburn sanctions, see George Diaz, *Auburn Finishes Season Undefeated Because of NCAA Sanctions, the Tigers Aren't Eligible for a Bowl Despite an 11-0 Mark*, ORLANDO SENTINEL, Nov. 21, 1993, at C3; Mike Dame, *Despite NCAA Sanctions, Auburn Still has an Agenda*, ORLANDO SENTINEL, Sept. 23, 1993, at D8; Steve Wieberg, *Auburn Hit Hard by NCAA Sanctions*, USA TODAY, Aug. 19, 1993, at C1; cf. Broyles, *supra* note 62, at 497-99, 503-07 (discussing NCAA's sanctioning of University of Kentucky and University of Nevada-Las Vegas).

140. For discussion of Pac-10's regulatory procedures, see *supra* notes 29-31. A similar issue was raised in *Blalock v. Ladies Profl Golf Ass'n (LPGA)*, where the court held that a golfer's one-year suspension imposed by the LPGA's Executive Board was invalid under federal antitrust law. See 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973). In declaring the suspension invalid, the court pointed to several factors including: (1) the player's good standing in the LPGA; (2) the LPGA's Executive Committee's "unfettered, subjective discretion" in imposing sanctions on its players; and (3) the fact that the LPGA's Executive Committee was comprised of other LPGA golfers who stood to gain a competitive advantage by excluding the suspended player from the golf tour. *Id.* at 1265. The players in *Hairston* could have used this case, as the factors considered by the *Blalock* court, especially the fact that the sanctions were imposed by a body comprised of the golfer's competitors, were also present in the *Hairston* case. See *Hairston*, 101 F.3d at 1317-18.

141. See generally *supra* note 70 (discussing constitutional-based challenges of NCAA regulations and rulings). In this context, many plaintiffs have raised constitutional arguments, especially procedural due process challenges to the system of discipline employed by the NCAA. See *id.*

142. For a discussion of the facts in *Hairston*, see *supra* notes 17-35 and accompanying text.

like the plaintiffs in *Hairston*, who were forced to suffer the consequences.<sup>143</sup>

The facts of this case highlight the inadequacies of the NCAA's system of enforcement where the NCAA and its member conferences are given the broad authority to sanction an institution's athletic program for NCAA rules violations.<sup>144</sup> While the NCAA or a member institution can suspend or declare ineligible individual players who commit NCAA violations,<sup>145</sup> it is the athletic program that often suffers the brunt of the consequences, even when, as in UW's case, the violations were not committed directly by the program's administration and were, for the most part, beyond that administration's control.<sup>146</sup> The decision in *Hairston*, therefore, continues the judicial trend, as established by the Supreme Court in *Board of Regents*, of upholding reasonable regulations and sanctions within intercollegiate athletics when they can be shown to "foster[ ] competition among amateur athletic teams."<sup>147</sup>

In light of the clear and well-established line of pro-NCAA precedent spawned by the *Board of Regents* decision and the futility of a third-party beneficiary breach of contract claim under these circumstances, the players' suit against the Pac-10 in reality, appears to have been doomed from the start;<sup>148</sup> this suit thus demonstrates the frustrations felt by innocent victims in a system where the group is punished for the independent transgressions of the few.<sup>149</sup> In conclusion therefore, notwithstanding creative uses of contract law, unless the Supreme Court retreats from its current view that horizontal restraints imposed by the NCAA are generally subject to

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143. See Eric Olson, *Lambright Kept Huskies Afloat in Sea of Troubles*, OMAHA WORLD HERALD, Sept. 14, 1997, at 1C.

144. See *id.*

145. See, e.g., *supra* notes 22-25 and accompanying text (discussing Billy Joe Hobert's loss of NCAA eligibility for accepting loan in violation of NCAA regulations). Despite losing his college eligibility, Hobert was drafted into the National Football League and has enjoyed an undistinguished, but financially rewarding professional football career. See generally Lars Anderson, *AFC East Scouting Report: Buffalo Bills*, SPORTS ILLUSTRATED PRO FOOTBALL '97, Fall 1997, at 130-31 (discussing Hobert's position as back-up quarterback for Buffalo Bills and overall lackluster NFL career).

146. For a discussion of UW's NCAA rule violations and resulting sanctions imposed by the Pac-10, see *supra* notes 27-32 and accompanying text.

147. *Board of Regents*, 468 U.S. at 117. In *Board of Regents*, the Supreme Court found that the NCAA television plan was unreasonable under the rule of reason analysis because it did not further this goal. See *id.* at 120.

148. For the concurring opinion's characterization of the players' antitrust claim as frivolous, see *Hairston*, 101 F.3d at 1321 (Trott, J., concurring).

149. For a discussion of the facts of *Hairston*, see *supra* notes 17-35 and accompanying text.

the rule of reason analysis, federal courts like the Ninth Circuit in *Hairston*, will continue to line up behind the *Board of Regents* decision and allow the NCAA and its member conferences virtual free reign under federal antitrust law to discipline member institutions' athletic programs.<sup>150</sup>

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150. For a general discussion of antitrust issues within intercollegiate athletics, see *supra* notes 64-71 and accompanying text.



